No. 90-1774

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

TYSON FOODS, INC.,

Petitioner,

vs.

LEWIS STEPHEN WORK, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT WORK, ET AL.'s BRIEF IN OPPOSITION TO PETITIONER TYSON FOODS, INC.'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Tyson's Statement of the Case is misleading in that it refers to compliance with "local limits" as if this were an established fact. *See,* Tyson's Statement of the Case, p. 6, para. 3, Tyson's Petition for Writ of Certiorari. Tyson failed to establish this defense below due to the fact there was never a "local limit" established at Green Forest in accordance with applicable EPA regulations. Consequently, both the trial court and the Eighth Circuit rejected this argument. *See, EPA vs. City of Green Forest,* 921 F.2d 1394, at 1406 (8th Cir. 1990). Accordingly, Tyson could only escape liability for violating the CWA by not violating the general prohibition against pass-through and interference, which is to say, by not causing the City to violate its CWA permit. Compliance with the pretreatment limits which Tyson dictated to the City was no defense.

A more complete Statement of the Case is contained in respondents' Petition for Writ of Certiorari filed in this same matter on May 15th, 1991, as Case No. 90-1768 (October 1990 term).

ARGUMENT

I.

RESPONDENTS, WORK ET AL., MET THIS COURT'S STANDARD ESTABLISHED IN *GWALTNEY.*

This Court in *Gwaltney of Smithfield, Ltd. vs. Chesapeake Bay Found., Inc.,* 484 U.S. 49 (1987), held that a citizen's suit under the CWA could not be maintained based wholly on past violations of the Act. In order to invoke the court's jurisdiction under the Act, a citizen-plaintiff must set forth good faith pleadings evidencing a

legitimate prospective concern. *Atlantic States Legal Found., Inc. vs. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990).

Every circuit court which has considered the *Gwaltney* decision in connection with this jurisdictional issue has concluded that citizen-plaintiffs may satisfy the prospective concern requirement either by (1) demonstrating that violations were occurring on or after the date of the complaint, or (2) by demonstrating facts in existence at the time the complaint was filed which would indicate a continuing likelihood of recurring violations on an intermittent or sporadic basis in the future. *See, Chesapeake Bay Found. vs. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988); *Sierra Club vs. Union Oil Co. of Calif.*, 853 F.2d 667, 670 (9th Cir. 1988); and *Carr vs. Alto Verde Indus., Inc.*, 924 F.2d 558, 560 (5th Cir. 1991).

The trial court determined that respondents Work et al. had demonstrated a reasonable likelihood of ongoing future violations. After hearing all the evidence, the trial court concluded " . . . there was substantial evidence adduced at trial establishing a reasonable likelihood of a recurrence of intermittent violations before and since November 1985 when Tyson's new treatment facility began operating . . . ". *Work, et al. vs. Tyson Foods, Inc., et al.*, 720 F.Supp. 132, 138 (W.D. Ark. 1989). The facts adduced at trial support the trial court's finding that respondents Work et al. met their burden under *Gwaltney, supra*.

First, it should be noted that the undisputed evidence shows that the City was violating its CWA permit when respondents Work et al. sent their 60-day notice letter in

November 1986, when they filed suit in March 1987, and for approximately 18 months thereafter. It was also undisputed that Tyson was the *only* significant industrial contributor to this POTW and totally dominated the POTW, being responsible for 80-90% of the plant's loading and volume. The summer before respondents Work et al. filed suit, there was a massive fish kill in Dry Creek which was initially attributed to Tyson by the State agency investigating the incident. At trial, Tyson disputed its role in that incident and presented conflicting evidence as to its cause. Also, when respondents Work et al. filed suit, the City had failed to meet its deadlines for construction of a new POTW and Tyson had announced plans to increase production at its Green Forest plant.

At the time this suit was initiated, the situation closely resembled that of the early 1970's when a few of the respondents in this case sued in State Court to prevent Tyson's then-subsidiary, Franz Foods, from polluting Dry Creek by running its waste through the City's inadequate and overloaded POTW. Green Forest constructed a new "state-of-the-art" plant to handle Tyson's waste and a settlement agreement was concluded with Tyson in 1976, wherein Tyson agreed to cease causing pollution in Dry Creek. However, as indicated by the record in this case, Tyson breached its contract almost immediately, and resumed its pollution of Dry Creek by repeatedly expanding its production facilities and overloading the City's POTW.

David Derrick, an engineer with experience in wastewater treatment facilities and industrial pretreatment, testified that Tyson's contribution to the POTW at the time respondents Work et al. filed their complaint was

causing the City to violate certain parameters of its NPDES permit and also causing an increase in the magnitude and duration of violations of other parameters. Mr. Derrick testified that the permit violations would have been less frequent and less severe but for Tyson's contribution to the POTW. This is, of course, after Tyson had installed its pretreatment facility and at the time respondents Work et al. filed suit. Mr. Derrick also testified that Tyson could have installed a much more sophisticated pretreatment facility which would have resulted in Tyson's contribution to the POTW being of a higher quality, thereby improving the POTW's performance.

In its written opinion, the trial court noted that an upset occurred at the POTW during the final days of trial. Respondents Work et al. videotaped this incident and presented it to the jury. 720 F.Supp. at 138. The tape reflected a situation in Dry Creek showing foam and floating waste solids in the creek, which flows across petitioners' properties – conditions which again represented violations of the City's NPDES permit. The State ultimately attributed this event to excessive oil and grease in Tyson's waste due to a new process implemented at the Tyson facility. After the trial, the State filed a brief asking that the trial court fashion injunctive relief against Tyson to prevent this from occurring in the future.

Finally, at the time of suit, both the City and Tyson were spreading a semi-solid sludge throughout Carroll County, including into the Imminent Health Threat Zone, raising concerns that this material was flowing onto surface waters in the vicinity of property owned by respondents Work, et al.

With the City in actual violation at the time the suit was filed, with Tyson's history of causing pollution in Dry Creek even after remedial measures were taken, and continued domination of the City's out-of-compliance POTW, with plans in place for yet further expansion of Tyson's Green Forest processing facilities, and the dumping of sludge in the Imminent Health Threat Zone, the trial court clearly had no choice but to find a basis existed for plaintiffs' prospective concerns at the time the suit was filed.

In summary, the instant case did not turn upon any subtle or ambiguous aspect of the *Gwaltney* decision. Rather, the outcome was driven by facts. The respondents are unaware of any glaring dichotomy in the circuit court decisions which the instant case serves to highlight or otherwise frame. Petitioner makes reference in its writ to Justice Scalia's concurring opinion. However, presumably the majority was aware of Justice Scalia's position when their opinion was written. At any rate, the subtle difference between Justice Scalia's position and that of the majority would not have altered in any way the outcome in this case. There simply is no basis for revisiting *Gwaltney* in the context of this particular suit.

II.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE STANDARD APPLICABLE TO INDIRECT DISCHARGER LIABILITY UNDER THE CWA.

Under the CWA, § 307(b)(1) [33 U.S.C. § 1317(b)(1)], an indirect discharger [that is, one who discharges its wastes into a publicly owned treatment works ("POTW"),

rather than directly into the nation's waterways], is prohibited from discharging waste to a POTW which either passes through the POTW without receiving adequate treatment, or interferes with the POTW's ability to adequately function. Tyson is such an indirect discharger in this case, and therefore was under this statutory prohibition. Tyson argued below, *inter alia*, that the trial court improperly instructed the jury on the standard applicable to indirect dischargers. The Eighth Circuit, however, correctly found that the jury was properly instructed on the standard pertaining to indirect discharger liability under § 307(b)(1) of the CWA [33 U.S.C. § 1317(b)(1)]. The trial court's instruction on this point (Instruction No. 23) stated:

> If you find by a preponderance of the evidence that Tyson Foods, Inc., has violated the Clean Water Act by *causing* the City of Green Forest, Arkansas, to violate a provision of its Clean Water Act permit, you must determine the number of occasions on which Tyson has violated the Clean Water Act. In order to make this determination, you must determine how many violations by the City of its Clean Water Act permit were caused by Tyson. (emphasis added).

Applying this instruction, it is clear that the jury could only find that Tyson violated the CWA by finding that Tyson had *caused* the City to violate its NPDES permit. There is nothing which supports Tyson's position that anything further is required to establish a finding of indirect discharger liability under the Act. Tyson's argument is essentially an effort to confuse this issue by urging an interpretation of *National Ass'n of Metal Finishers vs. EPA*, 719 F.2d 624 (3d Cir. 1983), [rev'd on other

grounds, *Chemical Mfrs. Ass'n vs. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985)] ("*NAMF*"), to require a finding that an indirect discharger must cause *and significantly contribute* to a POTW's permit violations to be liable. Clearly, this was not the intended result.

NAMF dealt with an industry challenge to the EPA's regulatory definitions of "pass-through" and "interference." There, the court did remand the definition of "interference" to the EPA after finding that liability premised solely on an indirect discharger's "significantly contributing to" a POTW's noncompliance with its permit could potentially result in a finding of liability without *causation*. The court held that such a result would be contrary to the intent of the CWA. The court did not (despite Tyson's novel attempt to misconstrue the court's language) require *both* a finding of causation *and* a separate finding that the indirect discharger *significantly contributed* to the POTW's permit violations before liability would attach.

> We conclude that, given the language and purpose of the Act, an indirect discharger cannot be liable under the prohibited discharge standard unless it is a cause of the POTW's permit violation or sludge problem.

NAMF, 719 F.2d at 641.

To accept Tyson's argument that there must be a finding that the indirect discharger both caused the permit violation and significantly contributed to the same permit violation would be to abandon common sense. It is implicit in a finding of causation that an indirect

discharger has also significantly contributed to the POTW's permit violations.[1]

This is not an issue which would be proper for certiorari to this Court. There is no conflict between the circuits over the standard applicable to indirect dischargers such as Tyson. There have been no other instances of either EPA or citizen enforcement against indirect dischargers where confusion has arisen over this

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[1] Tyson refers in fn. 5 to its argument below that no regulatory definition of "pass-through" or "interference" existed after *NAMF*, and thus it could not be liable under §307 of the Act. 33 U.S.C. §1317 or §307. This argument was rejected below, and it appears from Tyson's passing reference to this argument that it has now resigned itself to this fact. The *NAMF* court did not invalidate the *prohibition* against pass-through and interference, but only the regulatory *definitions* of those terms. The court refused to remand the general prohibitions contained at 40 C.F.R. §403.5 in reaching its decision. 719 F.2d at 641, fn.17. The general prohibitions contained at 40 C.F.R. §403.5, "which provide the framework for the national pretreatment program, were not at issue in the *NAMF* litigation and have continued in effect." 52 *Fed. Reg.* 1588 (1987).

Also Tyson's own representative in charge of environmental matters, Mr. Louis Williams, testified he was well aware of Tyson's duty not to cause the City's POTW to violate its permit limits. Thus, it is clear Tyson was aware of its duties under §307, did not need a less ambiguous regulatory definition to understand those duties, and simply chose to ignore the requirements of the CWA, pollute indiscriminately, and avoid the cost of compliance until this course of conduct was no longer available. Had Tyson's argument on this point been accepted, there would have been no standard applicable to indirect dischargers, such as Tyson, under the Act and §307 would have been meaningless. Surely the prohibition against pass-through and interference contained in §307 of the Act would prevent such an absurd result.

issue. Likewise, there has been no confusion (with the possible exception of that which apparently exists in the minds of Tyson's legal counsel) as to an indirect discharger's duties under the Act. Again, Tyson's own employees testified they understood their duties in this regard. Thus, there is no basis under Sup. Ct. Rule 10 to review this issue.

III.

RESPONDENTS DO NOT SEEK PUNITIVE DAMAGES UNDER THE CWA, AND AN AWARD OF SUCH DAMAGES UNDER RESPONDENTS' COMMON LAW ACTIONS WOULD VIOLATE NEITHER THE EIGHTH NOR FOURTEENTH AMENDMENTS.

It appears that petitioner Tyson actually raises three separate issues with regard to punitive damages. First, it appears to argue that respondents Work et al. cannot recover punitive damages under the Clean Water Act. Second, petitioner argues that an award of punitive damages to respondents would violate the Eighth Amendment's prohibition against excessive fines. Third, petitioner alleges that a punitive damage award would violate the due process clause of the Fourteenth Amendment, on the grounds that there is an alleged deficiency of statutory or common law guidelines by which to channel the jury's discretion in this regard.

In framing the issues which petitioner seeks to have this Court consider in connection with respondents' claim for punitive damages, Tyson mischaracterizes the situation in its entirety. Specifically, petitioner Tyson attempts to argue that respondents Work et al. are asserting a punitive damage claim based on Tyson's violations of the

Clean Water Act, and even assert that " . . . petitioners have been unable to find any cases in which the EPA has recovered punitive damages from one violating the Act . . . " (*See*, Tyson's Petition, fn. 9, p. 19).

This is frankly a non-issue, for the simple reason that respondents have never sought punitive damages on the basis of Tyson's violation of the Clean Water Act, and the Eighth Circuit – in determining below that plaintiffs were entitled to a punitive damages instruction – did not make that determination on the basis of the CWA.

The respondents in this case are neither a public interest group nor an environmental coalition; rather, they are individual victims of Tyson's unlawful activities who have personally sustained damages as a result of Tyson's inappropriate conduct. Respondents, in initiating this case, brought two separate types of action against Tyson. One cause of action, the CWA citizens' suit, was brought to enforce the Clean Water Act against Tyson and seeks the assessment of penalties for its public wrongs. The other actions brought are the private common law causes of action, seeking compensation and punitive damages for the private wrongs committed against the individual respondents by Tyson.

Penalties assessed under the Clean Water Act are assessed on a strict liability basis, without regard to either the violator's intent or whether there has been any private wrong or damage caused. Under Arkansas common law, punitive damages turn upon the *state of mind* of the actor, and require private harm to have occurred from the conduct. Tyson's violations of the CWA were neither sufficient nor necessary to give respondents the right to

seek punitive damages under Arkansas law. Rather, it was Tyson's willful disregard of respondents' rights and interests while pursuing its own interests that establishes the basis of respondents' punitive damages claim.

Tyson points to no case law holding that enforcement of a public sanction against a wrongdoer in any way precludes an award of punitive damages in a private cause of action brought by victims of the wrongdoing. Further, the CWA itself expressly states:

> (e) *Statutory or common law rights not restricted.* Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute *or common law* to seek enforcement of any effluent standard or limitation or to seek *any other relief* (including relief against the Administrator or a state agency). [emphasis added]

33 U.S.C. §1365(e).

With regard to the Eighth Amendment issue raised by petitioner, it is clear from this Court's decision in *Browning-Ferris Indus. vs. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), that the Eighth Amendment's prohibition against excessive fines does not relate to private causes of action. Since petitioners' claim for punitive damages in this case arises only out of their common law cause of action against Tyson for the wrongs it committed against them personally, and no portion of the funds thus awarded will inure directly to the benefit of the government, the Eighth Amendment does not apply.

Concerning petitioner's due process argument, this Court recently considered and exhaustively discussed

that issue in the case of *Pacific Mut. Life Ins. Co. vs. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991). It would seem most unlikely that the Court would be interested in taking up another case on this issue so soon after *Haslip*, and especially not one in which punitive damages have yet to be awarded, no jury instruction has been given, and no review process has taken place. *Also, the Eighth Circuit recently remanded a punitive damage case for a determination of constitutionality of Arkansas' own punitive damages law. That determination may moot this argument.*

Finally, respondents should point out that, while Tyson made passing reference to these issues at various stages in the litigation, those references were general in nature, and the courts below have not been called upon to deal with them directly. Both the trial court and the Eighth Circuit's decisions with regard to the punitive damage issue have turned on interpretations of Arkansas common law, not Eighth and Fourteenth Amendment considerations. Of course, this is because the Eighth Amendment clearly does not apply, and there has been no process related to punitive damages to review with regard to the due process requirements of the Fourteenth Amendment. The fact remains that a review of petitioner's issues concerning punitive damages on the current record would have to be conducted without benefit of actual consideration of the issue by the courts below.

CONCLUSION

Wherefore, respondents pray that petitioner Tyson Foods, Inc.'s petition for a writ of certiorari to the United States Court of Appeals to the Eighth Circuit be denied.

Respectfully submitted,

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